



THE PAIUTE INDIAN TRIBE OF UTAH

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TRIBAL COUNCIL MEMORANDUM

TO: *The Paiute Indian Tribe of Utah Tribal Members*

FROM: *The Paiute Indian Tribe of Utah Tribal Council* 

Date: *July 26, 2019*

RE: *Shivwits Hecla Pond*

The Shivwits Band Hecla Pond is an on-going issue that was first documented in the early 2000's. The Hecla Pond is on the Shivwits Reservation and is a product of hazardous waste in mining waste and tailings impoundment ponds resulting from mining activities conducted pursuant to leases entered between the Shivwits Band and two separate mining companies (Hecla Mining Company and OMG Americas, Inc.).

Shivwits approached the Paiute Indian Tribe of Utah with a resolution that was not fully executed and is marked as Resolution 2018-04, attached. Shivwits Resolution 2018-04 relates to the remediation of hazardous waste in mining waste and tailings impoundment ponds on the Shivwits Reservation resulting from mining activities conducted pursuant to leases entered between the Shivwits Band and two separate mining companies (Hecla Mining Company and OMG Americas, Inc.). The Resolution also references a contract with American Marketing Group ("AMG") "to evaluate the background and present status of the waste ponds, and legal claims related thereto." It appears that BIA has engaged AMG to review the effectiveness of the previous cleanup of the Shivwits waste ponds. In short, it appears that the Band proposes that AMG continue to carry out its environmental evaluation work, but on behalf of the Band rather than BIA, and using funding obtained through a PL 93-638 contract entered directly between BIA and the Band.

Article VIII Section 2(b) of the PITU Constitution expressly prohibits the Bands from separately contracting with the federal government, including for purposes of a PL 93-638 contract. The Tribe has tried to facilitate conversations with the Shivwits Band Council, along with the Bureau of Indian Affairs.

During this exact time the Chief Finance Officer, Tribal Administrator, and Tribal Chairperson working on Environmental Protection GAP Grant for a GAP Coordinator. The Tribe was awarded this grant and now has and EPA GAP Coordinator, Charlotte Domingo, who is available to assist all the bands.

Below is a detailed description of events:

February 20, 2018: Hecla Pond Meeting Agenda. Meeting with Department of Interior Bureau of Indian Affairs, American Marketing Group, and Shivwits Band Council.

February 28, 2018: Shivwits Resolution 2018-04 was approved.

March 1, 2018: The Paiute Indian Tribe of Utah Tribal Council meets with the Shivwits Band Council, and their attorney Mark Echo Hawk. At this meeting Shivwits Band requested the Tribe to approve the resolution allowing the Band to enter into a P.L. 93-638 Contracting, fully knowing it goes against the Paiute Indian Tribe of Utah Constitution. At this meeting the Tribe requested more information and wanted to discuss this with the Bureau of Indian Affairs.

March 15, 2018: The Paiute Tribe sends an official letter requesting a meeting and requesting all the documents to decide on the Shivwits Band Resolution 2018-04.

March 20, 2018: The Shivwits Band set deadline for P.L. 93-638 Contracting.

March 23, 2018: Received a letter addressed to Tami and Superintendent Williams from Shivwits Band Attorney Mark Echo Hawk.

April 5, 2018: Phone call with Superintend Williams regarding Shivwits P.L. 93-638 contracting. At this point there is no written notification. BIA strongly suggested that the Tribe does not 638 this work. The Shivwits Band does not have the infrastructure and systems in place to support 638 contracting and if the Tribe does the 638 contracting on behalf of the Shivwits Band, the Shivwits Band will have to follow the Tribe's procurement policies. BIA wants to remain accountable.

April 13, 2018: Tribal Chairperson sent an e-mail to Shivwits Band to request a tour of the Hecla Pond.

April 18, 2018: Site visit to Hecla Pond with Patrick Charles, Travis Duran, Tamra Borchardt-Slayton, Tyler Prisbrey, and Shane Parashonts.

April 19, 2018: Meet with the BIA, who again strongly suggests that the Tribe does not 638 this work, BIA stated they would meet and discuss this with the Shivwits Band Council.

May 1, 2018: The PITU sent letters to the Shivwits Band Council and the Bureau of Indian Affairs requesting to meet with all three entities to discuss the reason why the PITU is not inclined to enter into a P.L. 93-638 Contract without confusing any of the parties.

October 10-11, 2018: The Environmental Protection Agency, Regional Tribal Operations Committee came to St. George, UT. The Tribe chose this site to highlight the issues of the Shivwits Band and the Hecla Pond. Officials from the EPA and Region 8 Tribal Environmental Directors came to the reservation to discuss and tour the Hecla Pond.

Our hope in releasing all these documents is to clear up any confusion that is taking place by the miscommunication from the Tribe and the Shivwits Band. Although, we have brought agencies to view this issue and we now have a full-time Environmental Coordinator working for the PITU, we have not had any follow-up discussions with the Shivwits Band Council. The PITU did not enter into P.L. 93-638 Contracting due to the recommendations of the Bureau of Indian Affairs. No further action was taken to allow the Band to enter into the P.L. 93-638 contracting on its own because it goes against our Tribe's constitution. If you have any questions regarding this matter, please put your remarks in writing and attention them to Carol Garcia, Tribal Council Secretary or you can email her at cgarcia@utahpaiutes.org

Hecla Pond 2 Meeting Agenda

February 20, 2018

Meeting Location:

Shivwits Band Community Center

Conference call-in number: 1-866-901-0426, Participant code 9825954#

Meeting Participants:

DOI, AMG, and Shivwits Band

Agenda:

- | | |
|------------------|---|
| 5:30 p.m. | Hecla Pond 2 Technical and Legal Recommendations – AMG |
| | Petition to EPA |
| | Breach of contract lawsuit |
| 6:15 p.m. | Hecla Pond 2 Technical and Legal Recommendations – DOI |
| | DOI legal update - DOI |
| | BIA lease status – BIA |
| 6:45 p.m. | Next Steps – Group |
| | Tribal perspective – Shivwits Band |
| | Request for Proposal – AMG |
| | P.L. 93-638 Contract – BIA |
| | Schedule |
| 7:30 p.m. | Meeting Adjourn |



Memorandum

ATTORNEY WORK PRODUCT

To: Greg Licht, American Marketing Group (AMG)
From: Sarah Roubidoux Lawson
Date: December 8, 2017

EXECUTIVE SUMMARY

The Shivwits Band of Paiutes (the Band) is grappling with what to do about the legacy hazardous waste left on the Band's reservation, purportedly in compliance with the terms of a long-term, BIA-approved lease between the Band and Hecla, the successor in interest to St. George Mining Company (SGMC). I have been tasked with evaluating all legal bases under which the Band might pursue its ultimate objective of compelling the removal of Hecla's hazardous waste from the reservation without further cost to the Band.

This memo analyzes the factual and regulatory background of the case, the federal environmental and Indian law statutes that apply, all potential causes of action available to the Band, and recommends a path forward. These recommendations are to:

- (1) submit a Petition for a Preliminary Assessment of the site to EPA under Section 105(d) of CERCLA, requiring the EPA to either perform a preliminary assessment of the site or explain why the assessment is not necessary; and
- (2) take action against Hecla (with the assistance of BIA) under the lease, to have the 1991 and 1995 lease amendments cancelled as void; and/or to sue Hecla for breach of contract based on Hecla's current lease with the Band.

Under either scenario, the remedy should be the removal of wastes from Pond 2. Permanent storage or a payment of money damages is not adequate to meet the long-term monitoring requirements that are necessary for the storage of hazardous waste.

FACTUAL AND REGULATORY BACKGROUND

1. The Shivwits Band of Paiutes and its Reservation

The Shivwits Band of Paiutes are a part of the larger Paiute Indian Tribe of Utah. In 1865, the Utah Paiutes and the federal government agreed to a treaty, but the treaty was never ratified by the Senate. A reservation for the Shivwits was later established by Congress in 1891.¹

For the temporary support of the Shebit tribe of Indians in Washington County, Utah, and to enable them to become self-supporting, the purchase of improvements on lands situate near the Santa Clara River on which to locate said Indians, the purchase of animals, implements, seeds, clothing and other necessary articles, for the erection of houses and for the temporary employment of a person to supervise these purchases and their distribution to the Shebits, ten thousand dollars. This item to be immediately available.

The boundaries of the Shivwits reservation were defined by executive order on April 21, 1916.

It is hereby ordered that the following-described lands in Washington County, Utah, containing approximately 26,880 acres, be, and they are hereby, withdrawn from all forms of settlement, entry, or other disposal, and set aside as a reservation for the Shebit or Shivwits Tribe or Band of Indians, and for such other Indians as the Secretary of the Interior may settle thereon.

In 1935, the Band voted to approve the Indian Reorganization Act and organize a government under the Act. Twenty years later, the federal government terminated its relationship with the Utah Paiutes, including the Band.² The Band's reservation lands were transferred into fee ownership and lost to non-Indians.

Federal recognition was restored to the Paiute Indian Tribe of Utah, including the Shivwits and other Bands, in 1980.³ All rights and privileges reserved to the tribe or tribal members under any treaty, statute, or executive order were also restored.⁴ The Band's reservation was restored, and the remaining lands held by the Band were transferred back into federal trust status.⁵

¹ 25 Stat. 1005.

² Public Law 83-764 (25 U.S.C. 741, *et. seq.*), 22 Fed. Reg. 1503 (February 21, 1957)

³ 25 U.S.C. § 761.

⁴ 25 U.S.C. § 762(b)

⁵ 25 U.S.C. § 766

2. Site History

Hecla Pond 2 is located within the exterior boundaries of the Band's reservation, on 8 acres of land owned by the United States and held in trust for the benefit of the Band.

In 1983, SGMC entered into a lease covering 180 of tribal trust land with the Band. This lease was approved by the Area Director of the Phoenix Area Office of the Bureau of Indian Affairs (BIA). The lease was granted under the statutory authority conferred in 25 U.S.C. § 415, for an initial term of 25 years, with one 25-year renewal at the end of the initial term.

SGMC developed a series of waste and tailings ponds on the site. These waste and tailings ponds were considered to be "permanent improvements" under the lease. At the end of SGMC's operation in 1988, there were a total of eight ponds containing varying quantities and concentrations of solutions and solids from the acid leaching, and gallium and germanium extraction processes. In 1989, SGMC assigned its lease to Hecla. The lease assignment was approved by the Field Representative for the Southern Paiute Field Station of the BIA.

Hecla applied for a hazardous waste permit under Subtitle C of RCRA, but thereafter withdrew its application and instead, in May 1990 the company requested, and received, a "Bevill Exclusion" from EPA for its germanium and gallium processing activities at the site. This exclusion administratively termed wastes that would normally be considered hazardous as "non-hazardous". Between 1990 and 1995, the hazardous and non-hazardous wastes in the various ponds at the site were mixed and commingled into Pond 2.

In 1991, a lease amendment was executed between Hecla and the Band. Despite the fact that the lease amendment was approved by the BIA Field Representative upon the representation that terms of the amendment "are in the economic interests of the Shivwits Paiute Band," the lease amendments are clearly to the sole benefit of Hecla.⁶ The amendments re-characterize waste and tailings ponds as improvements that may be capped and left in place at the end of the lease.⁷ More importantly, the lease amendment leaves restoration of the site up to the Lessee, "at the Lessee's sole discretion," removing the interest of the Band in managing its lands and marginalizing the BIA's role as trustee.⁸

In 1995, Hecla entered into negotiation with OMG for OMG to take over mining operations at the site and the lease. During the OMG transaction, OMG found that Hecla failed to transport hazardous waste off site from 1991 to 1995, as required under the lease. Section II of the March 14, 1995 letter from Squires Sanders & Dempsey states:

A change in the regulatory treatment of the prospective Apex Unit feedstock might also create complication under the lease with the Shivwits Band of the Paiute Indian Tribe of Utah. Section 9.1 of the First Amendment of the Lease

⁶ 1991 Lease Amendment

⁷ 1991 Lease, Section 6.4

⁸ 1991 Lease, Term 10.6

Agreement between Hecla and the Shivwits Band, dated July 16, 1991, prohibits RCRA hazardous waste from being ‘brought upon’ or disposed up on the leased premises. The lease does allow generation of hazardous wastes, provided they are neutralized or disposed of off-site.

With the OMG transaction looming, Hecla agreed to move all wastes into Pond 2, and the lease with the Band was bifurcated. Hecla once again entered into lease amendment with the Band, reducing the number of acres under lease down to just the 8 acres around Pond 2. The Band then entered into a new lease with OMG to cover the remaining lands.

The 1995 lease amendment, also approved by the BIA Field Representative, also contains certain provisions that benefit Hecla greater than the Band is compensated for the burden. Specifically, the 1995 amendment stated that the purpose of the lease was for the

permanent storage of substances, including, but not limited to, mined ores, wastes, contaminated soils and such other substances as may be excavated and impounded from Lessee’s industrial operations on and in the immediate vicinity of the Property...⁹

In 1999, EPA issued an order against Hecla under Section 3013 of the Resource Conservation and Recovery Act (RCRA).¹⁰ Under the order, Hecla was required to submit two work plans for the Pond 2 site to EPA for review and approval:

- 1) a Leachate Sampling and Analysis Work Plan (Leachate Plan); and
- 2) a Soil Sampling and Analysis Work Plan (Soil Plan).¹¹

EPA retained authority to require any additional work beyond what was included in the work plan.¹² Upon completion of the work plan, and any additional work required by EPA, Hecla could submit a final report to EPA and request termination or satisfaction of the work plan.

Hecla was expressly required to continue to comply with all applicable federal and local laws, regulations, permits, and ordinances. The EPA order did not release Hecla from any obligations under the lease it has with the Band.¹³ In addition, the order expressly did not release Hecla from any liability arising from Hecla’s handling of hazardous waste on the site, including any claim that may be made by the Band or individual Band members.¹⁴

The Leachate Plan was prepared in January, 2000. The Soil Sampling Plan was submitted in September, 2000. On or about June, 2001, EPA and Hecla agreed “to dispense with additional

⁹ 1995 Lease, Term 6.1

¹⁰ EPA Order September 22, 1999.

¹¹ Finding #60, 1999 EPA Order

¹² Finding #63, 1999 EPA Order

¹³ Section XVI, 1999 EPA Order

¹⁴ Section XVII, Section XX, 1999 EPA Order

soil and leachate sampling and submit a revised work plan that entails the drilling of two wells to determine the extent of saturation.”¹⁵

Because both EPA and Hecla acknowledge that hazardous substances exist in the Hecla Pond, the parties have agreed that further characterization of these wastes as proposed in the current work plan is unnecessary and unhelpful to determining the extent of release, if any, outside of the Hecla Pond, and an appropriate closure remedy.¹⁶

EPA approved Hecla’s Soil Sampling Plan in September 2001. In 2004, EPA entered into a settlement with Hecla regarding the Soil Sampling Plan. As part of the process determining a closure plan for Pond 2, Monster Engineering, Inc. analyzed three different waste drainage/consolidation methods and six different cover system alternatives. Reviews were completed by Hecla.¹⁷ The Final Closure Plan does not discuss any of the other plan alternatives, and the Monster Engineering analysis was not included in the records provided. However, nothing in the records provided indicates that removal of the hazardous wastes in Pond 2 was considered as an alternative.

At the time the Final Closure Plan was submitted by Hecla in 2004, Pond 2 was found to contain:

- gallium and germanium extraction process wastes (solutions and solids)
- cobalt-sulfate recovery process wastes
- ore stockpile materials
- old impoundment liner materials
- subsoils

Some of these materials were mixed with lime and limestone prior to disposal into Pond 2 by Hecla in 1995, while others were dredged and pumped into the impoundment as a slurry.

The BIA requested more time to review the Final Closure Plan on June 10, 2004, the day before comments were due. The Final Closure Plan was approved by EPA on July 7, 2004, despite the concerns expressed by the BIA regarding tribal consultation in its June 10th letter.¹⁸ Closure activities began in the summer of 2004.

On July 15, 2004, more than a month after the BIA’s letter and one week after approving the Final Closure Plan, EPA finally issued a response to the BIA’s June 10th letter. EPA directed the BIA to submit comments to the closure plan after review by a BIA consultant. The BIA retained Ninyo & Moore to consult on the Final Closure Plan.

¹⁵ EPA letter to the Band, June 13, 2001.

¹⁶ Id.

¹⁷ 2004 Final Closure Plan, Section 3.0

¹⁸ EPA letter to Hecla, July 7, 2004; BIA Letter to EPA, June 10, 2004

In 2005, after completion of the clean closure analysis, the BIA sent numerous letters to Hecla requiring Hecla to cease all closure activities at the site.¹⁹ This was met with resistance from both Hecla and the EPA.²⁰ In the end, the EPA sided with Hecla in the dispute, claiming that the history of sampling at the site, the need for timely closure, and the EPA's responsibility for the protection of human health and the environment required that Hecla be allowed to complete closure under the Final Closure Plan.²¹

Hecla continued to perform monitoring at the site after closure in 2006. In 2011, Hecla requested to be released from continued monitoring.²² As of 2015, Hecla had not been released.

3. Current Status of Site Regulation

Hecla continues to operate under the EPA's Final Closure Plan, with a current lease on the property. Regulation and compliance with the terms of the approved Final Closure Plan are monitored by the EPA. All other regulatory activities, including lease compliance, are performed by the BIA.

3.1 BIA Regulatory Authority

Under the federal regulations and the terms of the lease, the BIA has the responsibility to perform lease compliance activities on the property.²³ Unless required under the terms of the lease, the BIA usually does not perform regular lease compliance or investigation, although the Agency may do so of its own accord or pursuant to a landowner complaint.

We may enter the leased premises at any reasonable time, upon reasonable notice, and consistent with any notice requirements under applicable tribal law and applicable lease documents, to protect the interest of the Indian landowners and to determine if the lessee is in compliance with the terms of the lease.²⁴

A BIA lease compliance investigation is triggered upon written notification from the Indian landowner of a lease violation.²⁵ If the BIA finds that there has been a violation of the lease, the BIA will send the lessee a notice of violation. The notice of violation gives the lessee 10 business days to either cure the violation dispute the finding, or request additional time to cure the violation. If the lessee does not cure the breach, the BIA will consult with the Indian landowner to determine whether the lease should be canceled.²⁶

¹⁹ BIA Letter to Hecla, July 12, 2005; BIA Letter to Hecla, August 25, 2005

²⁰ Hecla letter to BIA, August 2, 2005; Hecla letter to EPA September 2, 2005

²¹ EPA Letter to the Band, September 26, 2005

²² Hecla letter to EPA, March 23, 2011

²³ 25 C.F.R. Part 162,

²⁴ 25 C.F.R. § 162.464(a).

²⁵ 25 C.F.R. § 162.022(a), § 162.464(b). I

²⁶ 25 C.F.R. § 162.467.

If the lessee disputes that there has been a violation of the lease, the lessee can appeal the finding under the procedures outlined in 25 C.F.R. Part 2. Under the Part 2 process, a notice of violation issued by the BIA Agency office is appealed to the Regional Director. The Regional Director's decision may later be appealed to the Interior Board of Indian Appeals (IBIA), and an IBIA decision may be appealed to the federal court.

The BIA regulations on Indian trust land were comprehensively updated in 2012, and the new regulations went into effect in January 2013. All of the provisions of the new regulations apply to leases approved prior to January 2013, unless a specific term of the lease provides otherwise.

3.2 EPA Regulatory Authority

EPA has sole jurisdiction to implement and regulate RCRA within the exterior boundaries of the Shivwits Reservation.²⁷ The authority and responsibility of the EPA was discussed at length in Connie Sue Martin's RCRA/CERCLA memo, and is reprinted in part below.

RCRA was enacted in 1976 to establish a federal program to manage solid and hazardous waste. RCRA Subtitle C addresses hazardous waste management and RCRA Subtitle D addresses solid waste management. If a waste is neither hazardous nor a solid waste, it is not subject to regulation under RCRA. Under RCRA Subtitle C, Congress directed the EPA to promulgate standards applicable to persons who generate, transport, treat, store, or dispose of such waste. Federal waste handling requirements govern every phase of waste management, from its generation to its final disposition and beyond ("cradle to grave").

The stringent Subtitle C standards apply only to waste identified as "hazardous" according to regulatory criteria established by EPA. RCRA's primary purpose is to reduce the generation of hazardous waste and to ensure the safe handling and disposal of all waste in order "to minimize the present and future threat to human health and the environment."

Although RCRA is not principally designed to clean up toxic waste sites or to compensate those who have attended to the remediation of environmental hazards. Congress later added provisions allowing the EPA using RCRA § 6973, or citizens using RCRA § 6972, to sue for injunctive relief requiring responsible parties to clean up sites that pose "an imminent and substantial endangerment to health or the environment."

The primary goal of the RCRA Subtitle C program is to protect human health and the environment from the dangers associated with the generation, transportation,

²⁷ Finding #2, 1999 EPA Order

treatment, storage, and disposal of hazardous waste. Disposal of hazardous waste on land is a practice of particular concern to the RCRA program.

Unlike other environmental statutes that allow the EPA to delegate authority to enforce the statute to Indian tribes, RCRA does not treat tribes as a co-equal sovereign with states.²⁸ Thus, the Band must rely on EPA to enforce RCRA on the reservation. Outside the reservation, the state of Utah has delegated authority to enforce RCRA.²⁹

4. Federal Trust Responsibility and Tribal Consultation

The trust responsibility is the special relationship between tribes and the federal government, akin to “that of a ward to his guardian,”³⁰ and imposes special duties on the federal government when it acts on behalf of tribes. The federal trust responsibility is rooted in the treaties made between the federal government and tribes, Congressional enactments, and opinions of the United States Supreme Court. “Government... has charged itself with moral obligations of the highest responsibility and trust, obligations to the fulfillment of which the national honor has been committed.”³¹

Under the trust responsibility, the federal government has the duty to properly manage trust property on behalf of the beneficiaries. Failure to do so can leave the government accountable to the beneficiary under the common law duties of a trustee. “This is so because elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch. One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets.”³² If the Secretary subordinates tribal interests to other public interests in such a way to cause actual harm to the tribe’s interest, an actionable claim for breach of trust will lie.³³

LEGAL ANALYSIS

1. EPA Violated its Trust Responsibility

The EPA 1984 Tribal Consultation Policy states that EPA, “in keeping with the federal trust responsibility, will assure that tribal concerns and interests are considered whenever EPA’s actions and/or decisions may affect reservation environments.” The EPA failed its federal trust responsibility to the Band a number of times over the course of its dealings with Hecla.

²⁸ *Backcountry Against Dumps v. EPA*, 100 F.3d 147 (D.C. Cir. 1996).

²⁹ Utah Code Title 19, Chapter 6, Part 1 (Solid and Hazardous Waste Act).

³⁰ *Cherokee Nation v. Georgia*, 30 U.S.C. 1 (1831)

³¹ *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2324-25 (2011)

³² *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003)

³³ Cohen’s Handbook of Federal Indian Law § 5.05(4)(a) (2017)

The most glaring violations of the trust responsibility was included in a letter from the EPA to the Band prior to the EPA's approval of the Final Closure Plan. In that letter, the EPA stated that it will "infer the Band's concurrence on the closure work plan absent a response by June 11, 2004."³⁴ The BIA sent a letter to EPA on June 10, 2004, questioning the EPA's tribal consultation with the Band and requesting more time before approval of the Final Closure Plan. EPA refused, stating, rather ironically, that it could not justify postponing approval of the Plan.

1.1 The Bevill Exclusion

EPA did not consult with the Band before, or after, accepting Hecla's assertion that the Bevill exclusion applied to Hecla's wastes. The EPA's failure to consult with the Band on the Bevill exclusion did not give the Band the opportunity to weigh in on the EPA's decision and violated the terms of the Band's lease with Hecla.

Processing germanium and gallium does not meet the definition of beneficiation. As discussed in the report submitted by Gultekin Savci, EPA should not have accepted Hecla's Bevill exclusion analysis because the mineral processing of gallium and germanium is not a beneficiation process. Beneficiation ends at the recovery of the primary metal, copper. Gallium and germanium are byproducts of copper, and all wastes generated by processing germanium and gallium are wastes that are not excluded by Bevill.

There is no evidence that the EPA consulted with the Band before granting the Bevill exclusion to Hecla. The letter requesting the Bevill exclusion from Hecla's attorneys to the EPA made no mention of the fact that the operation was on land leased from the Band, that the land was in trust, or that it was entirely within the boundaries of the reservation. Hecla's attorneys did not send a copy of the letter to the Band or the BIA. In response, EPA similarly made no mention of the Band, the lease, or the reservation, and the Band and the BIA were not notified of the EPA's decision affecting the Band's trust lands.

In granting the Bevill exclusion to Hecla, EPA violated its 1984 tribal consultation policy requirement to "assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments."

The Band, however, will not be able to use this failure as a cause of action against the EPA. The federal government's failure to conduct tribal consultation does not create a private cause of action. Executive Order 13084, signed by President Clinton in 1994, expressly states that it "does not create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States."

EPA may, on its own, choose to re-examine its grant of the Bevill exclusion to Hecla. It is the EPA's longstanding policy that no written or oral assurances be given that it will not proceed

³⁴ EPA letter to the Band, May 28, 2004

with an enforcement response. This gives the EPA wide latitude to reopen Hecla's Bevill exclusion.

The Band may also include this claim in its request to EPA that the Agency reconsider the Bevill exclusion granted to Hecla, as outlined in Section 4.2 as a challenge in Connie Sue Martin's RCRA/CERCLA memorandum.

1.2 Granting the Bevill Exclusion Violated the Terms of the Lease

In granting the Bevill exclusion to Hecla, EPA facilitated Hecla's breach of the lease with the Band, and ushered in Hecla's strong-arming of the Band into an entirely one-sided lease amendment. EPA's Bevill exclusion effectively gave permission for Hecla to violate its lease with the Band by using the site for purposes outside the scope of the lease. This changed the terms of the lease between Hecla and the Band without the permission or involvement of the Band.

The Band's 1983 lease with SGMC did not allow for processing or storage of hazardous waste on the property. The 1983 lease did not mention the words "hazardous waste", nor was the processing or storage of such wastes on site allowed under the lease.

Term 6.1, Lawful Purposes, of the 1983 lease states:

Lessee may occupy and use the leased premises for any lawful purpose relating to the processing of mined ores provided that such occupancy and use conforms with applicable environmental laws and regulations.

Copper is a mined ore; gallium and germanium are byproducts of the beneficiation process for copper. Hecla was granted the Bevill exclusion in July 1990. Exactly one year later, in July 1991, Hecla and the Band executed a lease amendment allowing Hecla to use the property for hazardous waste. Relevant changes to the lease under the 1991 amendment are shown in **bold** below.

Term 6.1: Lessee may occupy and use the leased premises for any lawful purpose relating to the processing of mined ores, **mineral concentrates and metal byproducts**, provided that such occupancy and use conforms with applicable environmental laws and regulations.

The amendments to Term 6.1 allowing for "the processing... of metal byproducts", presume that processing metal byproducts such as gallium and germanium was not lawful purpose under the original lease. With EPA's blessing, Hecla operated in breach of the lease by processing metal byproducts for a year before the amendment was negotiated with the Band. Hecla clearly felt it had the right to do so because it had received the Bevill exclusion from EPA without any regard to, or consultation with, the Band.

Term 9.1 was also changed to Hecla's advantage during the 1991 lease amendments. The term did not allow for the generation or storage of hazardous waste.

Term 9.1: Lessee agrees to abide by all applicable federal, state, municipal laws, rules and regulations governing environmental protection, and any restrictions or environmental constraints reasonably imposed by Lessor and/or any such governmental body or bodies.

The 1991 amendment tacked the hazardous waste generation and storage terms below to the end of Term 9.1.

Lessee further agrees not to cause to be brought upon the Leased Premises or disposed of on the Leased Premises any wastes regulated as hazardous wastes by the Environmental Protection Agency under the Resource Conservation and Recovery Act of 1976, 42 USC 6901, et seq, as amended ("Hazardous Wastes"). Lessee shall, however, have the right to generate Hazardous Wastes in processing mined ores, mineral concentrates or metal byproducts on the Leased Premises, so long as Lessee either renders any such Hazardous Wastes non-hazardous under the Resource Conservation and Recovery Act of 1976, for disposal upon or within the Leased Premises or disposes of such Hazardous Wastes off the Leased Premises.

Hecla agreed to render hazardous wastes non-hazardous for disposal within the leased area. Hazardous waste that cannot be rendered non-hazardous must be transported off-site, even if that waste is generated on-site. 1995 lease amendment made no changes to Term 9.1,

EPA's erroneous acceptance of a Bevill exclusion for gallium and germanium had the effect of administratively rendering hazardous wastes "non-hazardous." In fact, gallium and germanium are hazardous wastes that were not allowed to be stored on the leased site at the time EPA acceptance of Hecla's Bevill exclusion analysis, and were only allowed after the amendment if they were rendered "non-hazardous." Hecla and EPA agreed that the wastes in Pond 2 were hazardous during negotiation of the Leachate and Soil sampling work plans. "This agreement was based on the parties' mutual acknowledgment that hazardous substances exist in the Hecla Pond."³⁵

1.3 The Final Closure Plan Violates Federal Law

The Final Closure Plan negotiated by Hecla with EPA did not take into account the lease the Hecla had with the Band, the terms of that lease, or the federal statutes and regulations regarding leasing of Indian trust land. The remedy ordered and approved by the Final Closure Plan is for permanent storage of the waste on-site. This is a permanent and perpetual encumbrance of Indian trust land that violates 25 U.S.C. § 177 and 25 U.S.C. § 415.

³⁵ EPA Letter to BIA, July 16, 2001.

25 U.S.C. § 177, known as the Nonintercourse Act, prohibits any lease or conveyance of Indian tribal lands unless authorized by Congress.³⁶ In 1955, Congress authorized leases of Indian trust land for a 25 year term, with the option to renew for an additional 25 years, subject to the approval of the Secretary of Interior.

Any restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary. **All leases so granted shall be for a term of not to exceed twenty-five years...[and] may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years...**³⁷

Hecla's lease was granted under the authority of 25 U.S.C. § 415. Permanent encumbrance of Indian trust lands by lease is not only disfavored, it is expressly disallowed by the statute.

In addition, the Final Closure Plan violates the provisions of 25 U.S.C. § 81, which prohibits encumbrances of Indian land for more than 7 years.

No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

The Final Closure Plan approved by EPA calls for *permanent* encumbrance of Indian trust land with the storage of hazardous waste. This is a permanent encumbrance that violates 25 U.S.C. § 415 and 25 U.S.C. § 81.³⁸

1.4 EPA Acted Outside the Scope of its Authority in Approving the Final Closure Plan

EPA acted outside the scope of its authority under RCRA when it approved permanent closure of Pond 2 on site under the Final Closure Plan. While EPA has full authority for implementation of RCRA programs in Indian Country, it does not have authority to encumber Indian trust land.

³⁶ *Chemehuevi Indian Tribe v. Western Regional Director*, 52 IBIA 192 (2010)

³⁷ 25 U.S.C. § 415

³⁸ The Final Closure Plan is an agreement that encumbers Indians lands for more than seven years, and was not approved by the BIA. The problem in this argument lies in the statute's use of the words "with an Indian tribe." The Band was not a party to the agreement between the EPA and Hecla, despite that the agreement between EPA and Hecla clearly encumbers Indian land.

Congress has left that authority to the Secretary of the Interior under a very comprehensive statutory scheme.

The Secretary of Interior has sole approval authority for all transactions involving Indian trust land. In addition to leases of Indian trust land, the Secretary must also approve mortgages on Indian trust land, easements on Indian trust land, acquisitions of Indian trust land, partitions of Indian trust land, and transfers of Indian trust land by gift, sale, or devise or intestate succession.³⁹

All authority over Indian trust lands and the management of Indian affairs has been delegated by Congress to the Secretary of the Interior and to the BIA.⁴⁰ The BIA submitted comments to the draft plan indicating that the Band and the BIA preferred that waste be removed to a permitted facility.⁴¹ The Band has routinely voiced concerns to EPA over the safety of Pond 2, and both the Band and the BIA expressed opposition to the EPA's Final Closure Plan.⁴² EPA lacked authority to approve a Final Closure Plan that encumbered Indian trust land without the consent and approval of the BIA.

2. BIA Violated its Trust Responsibility

The BIA has a duty independent from that of the EPA to act in the best interests of tribes in the management of their lands. That duty, however, does not require the BIA to engage in continuous monitoring of leases for potential breach.

Regulations promulgated under the statutory leasing authority of 25 U.S.C. § 415 can be found at 25 C.F.R. Part 162. Those regulations were updated in 1982, 2001, and 2013. Courts have held that prior to 2001, the regulations did not require BIA to take an active role in monitoring and managing leases for compliance.⁴³

The Secretary has additional duties when lease violations are called to his attention or when transfer of a lease is desired, but there is no suggestion in the regulations that he monitor a lessee's compliance with the lease or take any other active management role.⁴⁴

The leasing regulations were updated in 2001 to incorporate provisions of the American Indian Agriculture and Range Management Act (AIARMA).⁴⁵ In Oenga v. United States, the court held that amendments to the leasing promulgated in 2001 created a new duty on the part of the BIA to

³⁹ 25 U.S.C. § 483(a), 25 U.S.C. §§ 323-328, 25 U.S.C. §§ 372-374, 25 U.S.C. § 378, 25 U.S.C. § 2201 *et seq.*

⁴⁰ 25 U.S.C. § 2

⁴¹ BIA letter March 17, 2000. "We believe wastes generated during the investigation must be removed to an appropriate, permitted facility."

⁴² EPA letter to the Band, May 7, 2001

⁴³ Brown v. United States, 86 F.3d 1554 (Fed. Cir. 1996); Oenga v. United States, 91 Fed. Cl. 629 (2010)

⁴⁴ Brown v. United States, 86 F.3d at 1565

⁴⁵ 25 U.S.C. § 3701 *et seq.*

take an active role in lease management.⁴⁶ According to the court, the requirement of 25 C.F.R. § 162.108(b) that BIA “ensure that tenants comply with the operating requirements in their leases, through appropriate inspections and enforcement actions as needed to protect the interests of the Indian landowners”, taken together with the authority given to BIA to “enter the leased premises at any reasonable time, without prior notice, to protect the interests of the Indian landowners and ensure that the tenant is in compliance with the operating requirements of the lease” in 25 C.F.R. § 162.617(a), was sufficient to impose an affirmative duty on the BIA to ensure compliance with leases.⁴⁷

Unfortunately, this affirmative duty was modified when the leasing regulations were updated again in 2013. The language of 25 C.F.R. § 162.108(b) survived, but it was limited only to agricultural leases.⁴⁸ Lease compliance for all other leases is now covered by 25 C.F.R. § 162.022, which relieves the BIA of its active duty to monitor lease compliance, requiring that the landowner notify BIA of a potential lease violation before the BIA takes action.

Given that BIA had actual notice of the EPA activity on the Hecla site beginning in 1998, the BIA should have taken a more active role in matters regarding Hecla lease compliance, but BIA only had an affirmative duty to do so under the leasing regulations from 2001-2013. Similar to an action against EPA, however, an action against the BIA is now may barred by the statute of limitations. If the clock starts ticking at the time the EPA approved the Final Closure Plan, the cause of action will have arisen more than 6 years ago, and the action will be barred.

3. Hecla Violated the Lease

A review of the EPA enforcement action, records, and reports has revealed that Hecla has committed numerous violations of its lease with the Band. An action for breach of the lease can be brought by the BIA under a lease compliance action, by the Band itself, or by both.

3.1 Improper Storage of Hazardous Waste

Hecla did not have permission to use the land to store contaminated soil or hazardous waste on site from 1983-1995. The original lease only allowed mineral processing.

Term 6.1 (1983). Lessee may occupy and use the leased premises for any lawful purpose relating to the processing of mined ores provided that such occupancy and use conforms with applicable environmental laws and regulations.

This term was later amended in 1991 to include mineral concentrates and metal byproducts, and again in 1995 to allow:

⁴⁶ Oenga v. United States, 91 Fed. Cl. at 637.

⁴⁷ Id.

⁴⁸ 25 C.F.R. § 162.108 (2017)

...maintaining a tailings impoundment for permanent storage of substances, including, but not limited to mined ores, wastes, contaminated soils and such other substances as may be excavated and impounded from Lessee's industrial operations on and in the immediate vicinity of the Property.

3.2 Transporting Hazardous Waste onto the Property for Disposal

Hecla accepted hazardous cobalt feed material from a source located in Bartlesville, Oklahoma, for disposal on-site in Pond 2.⁴⁹ Under the 1991 lease amendments, Hecla agreed not to dispose hazardous waste produced off of the property onto the property for disposal.

Term 9.1 (1991): Lessee further agrees not to cause to be brought upon the Leased Premises or disposed of on the Leased Premises any wastes regulated as hazardous wastes by the Environmental Protection Agency under the Resource Conservation and Recovery Act of 1976, 42 USC 6901, et seq, as amended ("Hazardous Wastes").

3.3 Mixing Hazardous and Non-Hazardous Waste.

During its operations from 1989 forward, Hecla mixed and commingled both hazardous and non-hazardous waste in to Pond 2 on the site.⁵⁰ Mixing hazardous and non-hazardous waste, including Bevill excluded wastes, essentially renders non-hazardous to be hazardous. Hecla was required to render all waste non-hazardous for disposal on-site. All hazardous waste, or waste that could not be rendered non-hazardous, was required to be disposed of off-site.

3.4 Failure to Dispose Hazardous Waste to an Off-Site Location

The EPA found that hazardous wastes were disposed of on site.⁵¹ Hecla and their attorneys were aware of Hecla's violation of Term 9.1 during the contemplation of the transaction with OMG in 1995. During the OMG transaction, OMG found that Hecla failed to transport hazardous waste off site from 1991 to 1995. Section II of the March 14, 1995 letter from Squires Sanders & Dempsey states:

"A change in the regulatory treatment of the prospective Apex Unit feedstock might also create complication under the lease with the Shivwits Band of the Paiute Indian Tribe of Utah. Section 9.1 of the First Amendment of the Lease Agreement between Hecla and the Shivwits Band, dated July 16, 1991, prohibits RCRA hazardous waste from being "brought upon" or disposed up on the leased premises. The lease does allow generation of hazardous wastes, provided they are neutralized or disposed of off-site."

⁴⁹ Report of Gultekin Savci, Section 2.2.2

⁵⁰ Id.

⁵¹ Finding #57, 1999 EPA Order

Under the terms of the lease, Hecla is required to either transport hazardous waste off-site for disposal, or render hazardous waste non-hazardous for on-site disposal. Hecla violated the lease by disposing of hazardous waste on-site, in violation of Term 9.1.

Term 9.1 (1991): Lessee shall, however, have the right to generate Hazardous Wastes in processing mined ores, mineral concentrates or metal byproducts on the Leased Premises, so long as Lessee either renders any such Hazardous Wastes non-hazardous under the Resource Conservation and Recovery Act of 1976, for disposal upon or within the Leased Premises or disposes of such Hazardous Wastes off the Leased Premises.

3.5 Failure to Manage Hazardous Waste to Prevent Release

In its 1999 order, the EPA found that Hecla had “managed hazardous waste at the facility in a manner that releases to the environment are occurring at and from the Facility.”⁵² Hecla is required to prevent such environmental damage under Term 10.6 of the 1983 lease and all amendments.

Term 10.6: Lessee agrees to take such reasonable steps necessary to prevent Lessee’s operations on the Leased Premises from unnecessarily: (1) causing or contributing to soil erosion or damaging crops and forage; (2) polluting air or water; (3) damaging improvements owned by Lessor or other parties; or (4) destroying, damaging or removing fossils, historic or prehistoric ruins, artifacts, or other cultural resources.

Hecla’s failure to properly manage the hazardous waste it maintains on site is a clear violation of Term 10.6 of the lease.

POTENTIAL CLAIMS AVAILABLE TO THE BAND

1. Actions Against Hecla

An action against Hecla may lie on a number of causes of action, including that the lease amendments are void and that the lease is cancellable or terminable for breach.

First, lease terms providing for permanent storage violate federal statutes and regulations. The 1991 and 1995 lease amendments allowing permanent storage of hazardous waste on site clearly

⁵² Finding #49, 1999 Order. EPA later characterized the waste as “solid waste” in the 2004 Consent Order, Finding #50.

violate 25 U.S.C. § 415 and 25 C.F.R. § 162.411(a).⁵³ Under the federal statute and regulations, leases on Indian trust land are limited to 25 years, with a 25 year renewal.

The 1983 lease complied with federal law. That lease categorized waste and tailings ponds as “permanent improvements”.⁵⁴ At the end of the lease term, all permanent improvements were to be removed, and the Lessee was required to complete restoration of the site.⁵⁵

The 1991 amendments changed the removal requirements for waste and tailings ponds. Under the 1991 amendments, waste dumps and tailings impoundments were to be “covered by capping with a suitable material” within 18 months of expiration of the lease.⁵⁶ Merely capping the waste and leaving it in place even *after* expiration of the lease is effectively a permanent encumbrance of the property that violates 25 U.S.C. § 415.

The 1995 lease amendments take permanent intent one step further. The 1983 lease purpose was for the “processing of mined ores” in accordance with “applicable federal laws and regulations.”⁵⁷ The 1995 amendments change the purpose of this lease to “maintaining a tailings impoundment for permanent storage of substances.”⁵⁸

The 1991 and 1995 amendments providing for “permanent storage” of waste constitute a permanent and perpetual encumbrance on Indian trust land, in violation of the limitation imposed by 25 U.S.C. § 415, limiting leases of Indian trust land to a term not to exceed 50 years. “Because the Nonintercourse Act requires a federal statute or treaty to authorize conveyances between an Indian Tribe and a third party, failure to strictly comply with the requirements of such a statute renders any resulting conveyance void.”⁵⁹

Hecla may argue here that a severability clause of the original 1983 lease saves the 1991 and 1995 amendments.⁶⁰ Under the severability clause, if any provision of the lease is found to be unlawful, the remainder of the agreement survives. However, the United States Supreme Court

⁵³ “A business lease must provide for a definite term, state if there is an option to renew, and if so, provide for a definite term for the renewal period. The maximum term of a lease approved under 25 U.S.C. 415(a) may not exceed 50 years (consisting of an initial term not to exceed 25 years and one renewal not to exceed 25 years), unless a Federal statute provides for a longer maximum term (e.g., 25 U.S.C. 415(a) allows for a maximum term of 99 years for certain tribes), a different initial term, renewal term, or number of renewals.”

⁵⁴ 1983 Lease, Section 6.2

⁵⁵ 1983 Lease, Section 6.4

⁵⁶ 1991 Lease, Section 6.4

⁵⁷ 1983 Lease, Section 6.1

⁵⁸ 1995 Lease, Section 6.1

⁵⁹ Shoshone Indian Tribe of the Wind River Reservation v. United States, 672 F.3d 1021, 1038 (Fed. Cir. 2012)

⁶⁰ 1983 Lease, Term 18.4. “The provisions of this lease are severable, and should any provision be found void, voidable, unenforceable, or invalid, such... provision shall not affect any other portion or provision of this agreement.”

has held that a lease on Indian trust land with an invalid term is void.⁶¹ Provisions regarding severability are inapplicable and will not save such a lease.⁶²

Second, the 1991 and 1995 lease amendments may also be entirely void because they were not properly approved by the BIA. As noted in an undated draft letter to Hecla's attorneys at Davis, Graham & Stubbs, the 1991 and 1995 amendments were approved by the Field Representative for the Southern Paiute Field Station of the BIA. According to the letter, the Field Representative's approval authority was limited to leases of ten years or less during that time. The Field Representative lacked the proper delegated authority to approve the lease amendments, therefore the amendments actually lack any sort of federal approval required to consider them valid. This should be more fully analyzed by BIA staff, who should have access to the appropriate federal delegations found in the Department of Interior Departmental Manuals (DM) and Indian Affairs Manual (IAM).

Third, assuming that the lease amendments are valid and in full force and effect, the BIA or the Band could bring an action against Hecla for breach of contract, as outlined in Section 5 of this memo.

When the BIA performs lease compliance functions, it acts in its capacity as trustee. The BIA may begin a lease compliance action under 25 C.F.R. Part 162. A lease compliance action may be triggered upon written notification from the Indian landowner of a lease violation.⁶³ Based on the lease violations and Hecla's breach of contract, the BIA can move toward cancellation and termination of the lease.

Alternatively, the Band can initiate an action in federal court for breach of the lease and termination. "Nothing... prevents an Indian landowner from exercising remedies available to the Indian landowner under the lease or under applicable law."⁶⁴ Under the terms of the lease, a suit for breach of the lease may be brought in federal court in Utah.

The Swinomish Tribe is currently engaged in litigation with BNSF railway over breach of a right-of-way agreement.⁶⁵ Under the terms of BNSF's right-of-way with the Tribe, BNSF agreed to a limited number of trains passing through the Tribe's lands, and to inform the tribe of the contents of such trains. The Tribe filed suit in federal district court for declaratory relief on their breach of contract claim. In finding for the Tribe, the court held that:

There is no genuine issue of fact regarding the existence of a breach in this case. BNSF's predecessor promised to keep the Tribe apprised of the cargo it was

⁶¹ Scott v. Acting Albuquerque Area Director, 29 IBIA 61 (1996), *citing* Smith v. McCullough, 270 U.S. 456, 465 (1926)

⁶² Smith v. McCullough, 270 U.S. 456, 465 (1926)

⁶³ 25 CFR § 162.022(a), § 162.464(b).

⁶⁴ 25 C.F.R. § 162.022(a), Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 88 S. Ct. 982 (1968).

⁶⁵ Swinomish Indian Tribal Cmty. v. BNSF Ry. Co., 228 F. Supp. 3d 1171, 1176 (W.D. Wash. 2017)

carrying and to limit the number of trains (and the number of cars in those trains) “unless otherwise agreed in writing.” BNSF has breached both of those promises: it failed to timely disclose its cargo and it made no attempt to obtain the Tribe’s written agreement to an increase in traffic across the reservation until long after the unit train shipments had begun. Regardless of whether the Tribe subsequently withheld its consent in an arbitrary manner, BNSF breached the Easement Agreement.

The benefit of the Band initiating an action against Hecla is that it may lead to a faster resolution of matter. The Band would also have more control over litigation strategy. However, it will be more costly for the Band to enter into litigation on its own than it would be to ask the BIA to take on a similar action.

2. Band Action Against EPA

The Band may wish to initiate an action against EPA its failures under the federal trust responsibility to the Band. The EPA failed to the Band by granting the Bevill exclusion, approving a Final Closure Plan that violates federal law, and for acting outside the scope of its authority under RCRA, as outlined earlier in Section 4.1.

EPA’s failure to adhere to its 1984 Tribal Consultation Policy does not create a cause of action. Under the Administrative Procedure Act allows persons “affected or aggrieved” by federal agency action to seek judicial review.⁶⁶ However, the statute of limitations for claims against the government may prohibit the Band’s claims. The statute of limitations requires that claims against the government be brought within six (6) years from the date of the injury, or the date the action first accrued.⁶⁷ The Bevill exclusion was granted in 1990, and the Final Closure Plan was approved in 2004. All of the Band’s potential causes of action against the EPA accrued more than 6 years ago, and may be barred by the statute of limitations.

In addition, EPA may be shielded from liability under the Federal Tort Claims Act (FTCA). As noted in Connie Sue Martin’s memo, the FTCA contains an exception for federal agencies when a decision is made under the discretionary authority of the agency.⁶⁸ This exception is meant to prevent judicial second guessing of agency decisions when evaluating threats to public health.⁶⁹

⁶⁶ 5 U.S.C. § 702

⁶⁷ 28 U.S.C. § 2401(a)

⁶⁸ Martin memo, Section 7.1, October 3, 2017

⁶⁹ Id.

3. Action Against the BIA

The BIA has a duty independent from that of the EPA to act in the best interests of tribes in the management of their lands. The BIA had an affirmative duty to take an active role in monitoring the Hecla lease, including instituting a lease compliance action upon learning of Hecla releases and EPA action. Similar to an action against EPA, however, an action against the BIA may now likely be barred by the statute of limitations because the cause of action arose more than 6 years ago.

4. Potential Remedies

The remedy enforced by EPA under the Final Closure Plan is impoundment and cover, with permanent storage of the waste on site. This is the current status of the site in the eyes of Hecla and the EPA. However, this remedy is subject to the limitations and problems discussed below.

4.1 Lease Renegotiation for Permanent Maintenance

As explained earlier in this memo, this option is really not an option. The language of the lease that allows for “permanent storage” of waste on the site conflicts with federal law.⁷⁰

“Permanent” storage of wastes on the property is an unlawful purpose because Congress has not authorized the permanent or perpetual use or encumbrance of Indian trust lands.

The lease was granted under 25 U.S.C. § 415, which mandates that leases on Indian land may only be granted for one 25-year term and one 25-year renewal, for a total of 50 years. At the end of the renewal period a new lease must be negotiated.

At best, the Band and Hecla could negotiate for another 25-year lease, with a 25-year renewal, at the end of this lease, but that is not a realistic solution because it would require the parties to renegotiate the lease every 25-50 years -- in perpetuity. In addition, should the parties fail to come to an agreement on the terms of a new lease, or if Hecla should cease to exist as an entity through bankruptcy or otherwise, the Band will be left to deal with Pond 2 on its own. The Band is not in a position to take on this responsibility, nor does it care to.

4.2 Void, Cancellation, or Termination of the Lease

As discussed above, all of these remedies are available under either a BIA lease compliance action or a tribal suit against Hecla.

4.2.1 Voiding the Lease 1991 and 1995 Amendments

⁷⁰ 1995 Lease, Term 6.1

The 1991 and 1995 lease amendments may be void because the provisions for permanent storage violate the federal prohibition against the permanent and perpetual encumbrance of Indian land.

In addition, the lease amendments may be void because they were approved by a BIA employee who did not have the property authority to approve such amendments. The Field Representative only had authority to approve encumbrances for up to a ten-year term.

Voiding the 1991 and 1995 amendments would return the lease to the original 1983 version, which is far more favorable to the Band. The 1983 lease does not allow for the storage of hazardous waste on site, and requires that Pond 2 be removed and restored upon termination OR expiration of the lease.

4.2.2 Cancellation or Termination of the Lease

If the lease amendments are not void, then the Band or the BIA should seek the alternative remedy of cancellation or termination of the lease. The option on the current lease was exercised in 2008, and the lease now expires in 2033.

If the lease is terminated or cancelled, Hecla no longer has any obligation to pay rent. However, the bigger question is what obligation Hecla has to Pond 2 if the lease is terminated.

Under the original lease, the pond was a “permanent improvement” that would have to have been removed at termination or expiration of the lease. The 1991 lease amendment (if valid) changed this requirement.

Section 6.4: Conveyance of Improvements. Upon the expiration of this Agreement, **with the exception of waste dumps or tailings impoundments**, Lessee shall remove any and all of the improvements from the Leased Premises, and shall complete the removal and restoration of the Leased Premises within eighteen (18) months after such expiration date. **Waste dumps or tailings impoundments shall be covered by capping with a suitable material within said eighteen (18) month period.** If the Lease is terminated for any reason prior to the expiration date, Lessee shall complete the removal and restoration of the Leased Premises within eighteen (18) months after the receipt of such notice.

There may, however, be two different interpretations of this section. The interpretation that benefits the Band is to read this section as having two different requirements for how to deal with tailings ponds: one for expiration of the lease, and one for termination of the lease. Upon expiration, the ponds would be capped. If the lease is terminated, however, there is no separate provision for the tailings ponds, and the ponds would be treated as other improvements subject to removal and restoration.

RECOMMENDATIONS

1. Work with EPA on RCRA/CERCLA Issues

Given the uncertainty of the Band able to bring a cause of action against the EPA, I recommend that the Band try to work with EPA.

The first step in this process is for the Band to submit a Petition for a Preliminary Assessment of the site to EPA under Section 105(d) of CERCLA, as explained in Section 6.2.1 of Connie Sue Martin's memo. Within 12 months of the Band's Petition, the EPA is required to either perform a preliminary assessment of the site or explain why the assessment is not necessary.

The CERCLA petition process will allow the Band to bring forward other arguments addressed both in this memo, and those prepared by Connie Sue Martin and Gultekin Savci. Namely:

- That the Bevill Exclusion granted to Hecla was improper because the germanium and gallium operations did not meet the definition of beneficiation wastes;
- That EPA did not conduct any tribal consultation with the Band before granting the Bevill exclusion, in violation of the EPA's 1984 Tribal Consultation Policy;
- That EPA's grant gave permission for Hecla to breach the original 1983 lease it had with the Band by authorizing use of the site for the production of hazardous wastes;
- That EPA's negotiation for and selection of permanent closure of Pond 2 on site violates federal statutory prohibitions against the permanent encumbrance of Indian trust land contained in 25 U.S.C. § 177, 25 U.S.C. § 415, and 25 U.S.C. § 81; and
- That EPA's approval of the plan for permanent closure of Pond 2 on Indian trust land was outside the scope of the agency's authority. EPA has authority over RCRA enforcement and monitoring, but authority over Indian trust land and Indian affairs lies with Secretary of the Interior.

2. Action Against Hecla for Breach of Contract

The issues involving Hecla's performance under the lease and the lease amendments may be addressed by the Band, in federal court, or by the BIA through administrative action.

It may be best for the Band to work with the BIA to have the 1991 and 1995 lease amendments cancelled as void. As explained in Section 6.1 of this memo, the lease amendments are void because:

- The amendment of lease section 6.4 in 1991, and the amendment of lease section 6.1 in 1995 are intended to facilitate the permanent storage of Pond 2 waste on site. Permanent encumbrance of Indian trust land is not allowed under 25 U.S.C. § 415; and
- The Field Representative who approved the lease amendments did not have the authority to do so.

If the 1991 and 1995 amendments are void, Hecla and the Band will default to operating under the terms of the 1983 lease. This is good because the 1983 lease is the most beneficial to the Band.

Regardless of whether the 1991 and 1995 amendments are void, the Band can initiate an action against Hecla for breach of contract based on Hecla's current lease with the Band. As outlined in Section 5 of this memo, Hecla breached the lease contract with the Band in the following ways:

- Improper storage of hazardous waste on site from 1989-1995, in violation of term 6.1 of the 1983 lease;
- Transporting hazardous waste on the property for disposal, in violation of lease term 9.1 (1991 version, which was not amended in 1995);
- Mixing hazardous and nonhazardous waste, in violation of term 9.1 (1991)
- Failure to dispose of hazardous waste to an off-site location, in violation of lease term 9.1 (1991); and
- Failure to manage hazardous waste to prevent release, in violation of term 10.6.

The Band may seek to have the lease terminated for breach, and ask that the court order removal of the wastes in Pond 2. Removal of waste is really the only proper remedy here; permanent storage or a payment of money damages is not adequate to meet the long-term monitoring requirements that are necessary for the storage of hazardous waste.

SELA



SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

SAVCI REPORT FINDINGS

- EPA improperly granted a Bevill exclusion for wastes generated by Hecla at the site.
- All the wastes in other ponds were commingled into Pond 2 before Hecla's transfer of the lease to OMG.
- Waste from Oklahoma was brought to the to the site and disposed of in Pond 2.

RCRA LIABILITY

EPA

- Failure to enforce RCRA not actionable.
- EPA's remedy of permanent closure on site violates federal law.
 - EPA has "wide latitude" in crafting the remedy.

BIA

- "Operation" of a solid or hazardous waste disposal facility in violation of RCRA.
 - BIA may be forced to bring the facility into compliance.

HECLA

- Waste handling practices created an "imminent and substantial threat" to the health or environment.
 - Have to establish that the wastes are not subject to the Bevill exclusion.

RECOMMENDATION:

- Request that EPA re-evaluate the Bevill exclusion granted to Hecla, based on the analysis performed Gultekin Savci

CERCLA LIABILITY

EPA

- Failure to enforce not actionable.

United States

- The United States is an owner of a “facility” on Indian trust land under CERCLA.

HECLA

- Hecla is an owner/operator of a facility.

RECOMMENDATION:

- Petition the EPA to perform a preliminary assessment of the site

TRUST RESPONSIBILITY LIABILITY

**** Claims against the government are subject to a 6 year statute of limitations.**

EPA

- Failure to consult with the Band in granting the Bevill exclusion.
 - Failure to consult is not a cause of action.
- Bevill exclusion violated the terms of the lease.
 - The Band learned of the exclusion more than 6 years ago.
- RCRA remedy violates federal law.
 - The Band knew of the remedy more than 6 years ago.

BIA

- Failure to cancel void lease amendments.
 - Depends on whether the Band was informed by BIA the lease amendments were void.
- Failure take an active role in lease management.
 - Requires a finding that the BIA had an active role from 2001-2013.

RECOMMENDATION:

- Further investigation is required to determine whether the BIA informed the Band that the lease amendments were void.

BREACH OF CONTRACT/LEASE COMPLIANCE

HECLA

- Violations of the 1983 lease.
 - Improper storage of hazardous waste.
 - Failure to manage hazardous waste to prevent release.
- Violations of the 1991 lease amendment.
 - Failure to render all wastes non-hazardous.
 - Failure to transport hazardous waste off-site for disposal.
 - Mixing hazardous and non-hazardous waste (making all the waste hazardous).
 - Transportation of hazardous waste from off-site, for disposal on-site.
- The 1991 and 1995 lease amendments are void.
 - The Field Representative did not have authority to approve a lease term longer than 10 years.
 - The amendments seek to permanently encumber Indian trust land, which violates federal law.

RECOMMENDATION:

Our recommendations on this point are a two step process:

- **Step 1:** Request BIA take action to void the lease amendments.
- **Step 2:** File suit against Hecla for breach of contract under the 1983 lease and ask the court to order removal of Pond 2 and all associated outbuildings on the 100 acre 1983 lease site.



**SHIVWITS BAND OF PAIUTES
RESOLUTION NUMBER 2018- 04**

Re: Approval of P.L. 93-638 Contract

WHEREAS, the Shivwits Band of Paiutes of the Paiute Indian Tribe of Utah ("Shivwits Band" or the "Band") is an independent, sovereign Indian tribe recognized by the United States as such in 1891 by 26 Stat. 1005, and in 1980 by P.L.96-227, 94. Stat. 317, 25 U.S.C. § 761 et seq.; and,

WHEREAS, the Shivwits Band of Paiutes is one of five constituent Bands of the Paiute Indian Tribe of Utah, organized pursuant to the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, under the Constitution of the Paiute Indian Tribe of Utah, approved on June 11, 1991; and,

WHEREAS, both the Constitution, and the Bylaws, Article II, Section 1, provide that the governing body of the Shivwits Band of Paiutes is the Shivwits Band Council; and,

WHEREAS, the Shivwits Band Council can take official action by Resolution, pursuant to Article XII, Section 2 of the Bylaws; and,


WHEREAS, the Shivwits Band Council is dedicated to assisting and promoting the health of its members, preserving the Reservation and natural resources, and improving the health and quality of life of its members; and

WHEREAS, in 1983, the Shivwits Band entered a Lease with St. George Mining Company (SGMC), covering 180 acres of Tribal trust land, which Lease was approved by the Area Director of the Phoenix Area Office of the Bureau of Indian Affairs (BIA); and

WHEREAS, SGMC developed a series of eight (8) waste and tailings ponds on the mining site which were considered "permanent improvements" under the Lease, and, in 1989, assigned its rights under the Lease to Hecla Mining Company (Hecla); and

WHEREAS, in May 1990 Hecla requested and received a "Bevill Exclusion" from the EPA for its germanium and gallium processing activities at the site, and between 1990 and 1995, mixed and commingled hazardous and non-hazardous wastes in the various ponds, including waste from off-site locations in violation of the Lease; and

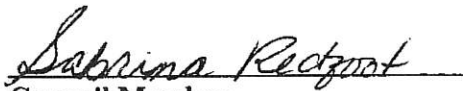
Authority for the foregoing Resolution is based on the Band's inherent sovereign authority, the Indian Reorganization Act of June 18, 1984 (48 Stat. 984), as amended and implemented by the Constitution of the Paiute Tribe of Utah, including Article VIII, Sections 2(a)(b)(c)(d) and (j), and the Bylaws of the Shivwits Band of Paiutes of the Paiute Indian Tribe of Utah, including Articles II, VII, Section 4, and XII, Sections 1 and 2.


Patrick Charles, Chairperson

C-E-R-T-I-F-I-C-A-T-I-O-N

2018-

It is hereby certified that the foregoing, "Resolution 2018- " was adopted by the affirmative vote of 4 for and 0 against, at a duly-called meeting of the Shivwits Band Council, composed of five (5) members of whom 4 members constituting a quorum were present, and 1 absent, held on February 28, 2018.


Council Member

Attested By: _____
Shivwits Secretary

PURPOSED RESOLUTION TO PITU 3/1/2018

RESOLUTION 2018-

SUPPORT FOR THE SHIVWITS BAND'S P.L. 93-638 CONTRACT

- WHEREAS,** the Paiute Indian Tribe of Utah ("Tribe") is a federally recognized Indian tribe under 25 U.S.C. § 761, et seq., organized under the Tribe's Constitution, as ratified by the Tribe on June 11, 1991, and approved by the Secretary of the Interior on July 15, 1991, and amended by the Tribe on August 12, 1997, and approved by the Secretary of the Interior on September 30, 1997, pursuant to Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984); and
- WHEREAS,** the Tribe's status as a federally recognized Indian tribe was restored on April 3, 1980 pursuant to Public Law 96-227, codified at 25 U.S.C. § 761, et seq.; and
- WHEREAS,** "Tribe" is defined in the Paiute Indian Tribe of Utah Restoration Act as the Cedar, Shivwits, Kanosh, Koosharem, and Indian Peaks Bands of Paiute Indians of Utah (25 U.S.C. § 761(1)); and
- WHEREAS,** Public Law 93-638, also known as the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA) provides for the entry of contracts and making of grants directly to federally recognized Indian tribes by the Secretary of the Interior and other government agencies; and
- WHEREAS,** the Shivwits Band has communicated its desire and intent to enter a P.L. 93-638 contract with the Bureau of Indian Affairs (BIA) to enforce its rights under a Lease entered into by the Band with St. George Mining Company in 1983 which Lease's rights were later assigned to Hecla Mining Company; and
- WHEREAS,** the Tribe believes that the entry of a P.L. 93-638 contract between the Shivwits Band and BIA will not interfere with the Tribe, its assets or resources, or the P.L. 93-638 contracts of the Tribe or its constituent Bands; and
- WHEREAS,** the Tribe understands that the Shivwits Band's desire to enter a P.L. 93-638 contract to initiate the process of enforcing the Band's rights under the subject Lease is in the best interests of the Band and the Tribe; and
- WHEREAS,** the Tribal Council supports the Shivwits Band in seeking to assist and promote the health of its members, preserve the Band's Reservation and natural resources and improve the health and quality of life of its members.
- THEREFORE BE IT RESOLVED THAT** the Tribal Council hereby supports the Shivwits Band in entering a P.L. 93-638 contract with the BIA to initiate the process of enforcing the Band's rights under the subject Lease; and
- BE IT FINALLY RESOLVED** that this Resolution may be forwarded to the appropriate officials at the Department of the Interior, Bureau of Indian Affairs.

CERTIFICATION

I hereby certify that the foregoing Resolution was fully considered by the Tribal Council at a duly called meeting in Cedar City, Utah, at which a quorum was present and that the same was passed by a vote of ___ in favor; ___ opposed, and ___ abstained this ___ day of _____, 2018.

Tribal Chairperson

ATTEST:

Tribal Council Secretary

Tamra Borchardt-Slayton

From: Tamra Borchardt-Slayton
Sent: Friday, March 16, 2018 11:09 AM
To: james.williams (james.williams@bia.gov)
Cc: Patrick Charles; Travis Parashonts (Cedar Band Chair); Jeanine Borchardt (Indian Peaks Chair); LaTosha Mayo; Corrina Bow (Kanosha Chair)
Subject: Shivwits Band Resolution 2018-04 Hecla Ponds
Attachments: BIALetterShivwitsResolution.pdf; ShivwisBandResolution2018-04.pdf; ShivwtisResolution2018-04PL93-638Contract.pdf

Jim,

Attached is a letter requesting information from the BIA and formally requesting a meeting. I am mailing the letter and resolutions to the BIA, but they are currently attached as an electronic copy.

Best,

Tami Borchardt Slayton

The Paiute Indian Tribe of Utah Chairperson

Paiute Indian Tribe of Utah

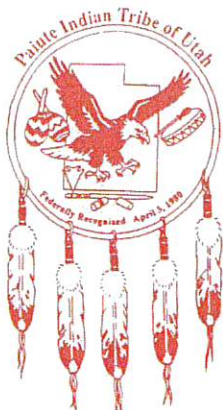
440 N Paiute Drive Cedar City, UT 84721

Office: (435) 586-1112 ext. 102

Cell: (435) 691-3946

tslayton@utahpaiutes.org

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THE PAIUTE INDIAN TRIBE OF UTAH

440 North Paiute Drive • Cedar City, Utah 84721 • (435) 586-1112

March 15, 2018

James E. Williams, Superintendent
Southern Paiute and Truxton Canon Agencies
13067 East Highway 66
Valentine, AZ 86437

Dear Jim,

The Paiute Indian Tribe of Utah is requesting information on the meeting that took place with the Shivwits Band regarding the Hecla Ponds. John Krause, an employee for the Bureau of Indian Affairs, stated that the Bands can go after PL 93-638 Contracts, as you are aware, Article VIII Section 2(b) of the PITU Constitution expressly prohibits the Bands from separately contracting with the federal government, including for purposes of a PL 93-638 contract, without the Tribe's permission.

We are also formally requesting information pertaining to the BIA and American Marketing Group "AMG." We need to see all documents to be able to make a decision on the Shivwits Band Resolution 2018-04, that is attached.

We would also like to formally meet with you, John, and the Shivwits Band Chairperson to discuss the specific PL 93-638 contracts. If you have any further questions, please contact me as soon as possible at (435) 586-1112 ext. 102 or tslayton@utahpaiutes.org

Sincerely,

Tamra Borchardt-Slayton
The Paiute Indian Tribe of Utah
Chairwoman

Tamra Borchardt-Slayton

From: Tamra Borchardt-Slayton
Sent: Friday, March 23, 2018 9:59 AM
To: Geoffrey D. Strommer
Cc: Shane Parashonts
Subject: Fwd: PITU Request for Information and Meeting / Shivwits Band's Request for P.L. 93-638 Contract Action
Attachments: Letter to T Slayton J Williams 3.22.2018 (signed).pdf; Resolution (Shivwits Band) Approving 638 (signed) 02.28.2018.pdf; PITU Resolution Approving Shivwits 638.docx; Agenda 2.20.2018 Meeting.pdf; Summary of Conclusions and Recommendations (AMG) 2.21.2018.pdf; Memo Summary re HECLA Pond Waste 12.8.2017.pdf

Get [Outlook for iOS](#)

From: Colleen Sullivan <colleen@echohawk.com>
Sent: Thursday, March 22, 2018 2:08:21 PM
To: Tamra Borchardt-Slayton; Williams, James
Cc: Patrick Charles; Carmen Clark; Sabrina Redfoot; tina sundance4; Glenn; Corrina Bow (Kanosh Chair); LaTosha Mayo; Jeanine Borchardt (Indian Peaks Chair); Travis Parashonts (Cedar Band Chair); Lora Tom (Cedar Chair); Krause, John; Mark Echo Hawk
Subject: PITU Request for Information and Meeting / Shivwits Band's Request for P.L. 93-638 Contract Action

Chairwoman Slayton and Superintendent Williams,

Please see attached correspondence regarding the above-referenced matter.

Colleen Sullivan, Paralegal
ECHO HAWK & OLSEN
505 Pershing Ave., Suite 100, P.O. Box 6119
Pocatello, Idaho 83205-6119
Office: (208) 478-1624 / Fax: (208) 478-1670
colleen@echohawk.com
www.echohawk.com

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& OLSEN

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WWW.ECHOHAWK.COM

March 22, 2018

Tamra Borchardt-Slayton, Chairwoman
Paiute Indian Tribe of Utah
440 N. Paiute Dr.
Cedar City, UT 86437

Sent Via Email (tslayton@utahpaiutes.org)

James E. Williams, Superintendent
Southern Paiute and Truxton Canon Agencies
13067 East Highway 66
Valentine, AZ 86437

Re: *Paiute Indian Tribe of Utah Request for Information and Meeting*

***Shivwits Band's Request for P.L. 93-638 Contract Action regarding HECLA
Lease Violations***

Dear Tami and Superintendent Williams:

The Shivwits Band Council is dealing with significant environmental resource damage issues on the Shivwits Reservation related to the actions and omissions of Hecla Mining Company. The Band needs a quick response and cooperation from the Paiute Indian Tribe of Utah Tribal Council to protect its interests.

At the Tribal Council's March 1, 2018 meeting, the Shivwits Band presented its Resolution 2018-04 (attached) to enter a P.L. 93-638 Contract with the BIA for activities related to the Band's remedies under its Lease with Hecla Mining Company (Hecla). The Band requested that the Tribal Council approve a Tribal Council Resolution (attached) supporting the Band's entry of such a contract.

The BIA has capacity to dedicate continued resources to help hold Hecla responsible for the violations and remedy current pond conditions. The BIA informed the Shivwits Band of the need for quick action through a 638 contract to implement alternative remedies identified by AMG.

Delay past the March 30th deadline will impact the Band's options to take advantage of BIA resources currently available.

March 22, 2018

Page 2

Tami requested information regarding a previous meeting between the Band and Mr. Krause/BIA regarding the Hecla ponds. We have included with this letter copies of the documents prepared for and reviewed in that meeting for your information and record. Please keep the information confidential as it relates to potential Shivwits Band litigation matters.

A meeting with the Band Council and Mr. Krause is scheduled for Wednesday, March 28, 2018 at 6:30 p.m. at the Shivwits Band building. You and the Tribal Council are welcome to attend.

As stated in the proposed Tribal Resolution, a P.L. 93-638 contract between the Band and BIA will not interfere with the Tribe, its assets or resources. The Shivwits Band seeks to enforce its rights under its Lease for the safety and health of its members, and the preservation of the Band's Reservation and natural resources.

Tami, in the future, please include the Band Council in any communications with the BIA or Department of Interior regarding Shivwits Band matters.

Mr. Williams, please include the Shivwits Band Council in any communications with Tami or the Paiute Indian Tribe of Utah regarding Shivwits Band matters.

We again inform the Tribal Council that the Band has a deadline for this contract of March 30, so time is of the essence, as previously stated. Delay is prejudicing the interests of the Shivwits Band.

Sincerely,



Mark A. Echo Hawk

MAE/cs

Cc: Shivwits Band Council
PITU Tribal Council
John Krause, BIA

Tamra Borchardt-Slayton

From: Tamra Borchardt-Slayton
Sent: Friday, April 13, 2018 10:20 AM
To: Patrick Charles
Cc: Jeanine Borchardt (Indian Peaks Chair); LaTosha Mayo; Corrina Bow (Kanosh Chair); Travis Parashonts (Cedar Band Chair); Shane Parashonts
Subject: Visit Hecla Ponds

Shivwits Chairman Patrick,

I am sorry that this is not in letter format. I am requesting a tour for myself, tribal administration, and any other council member that would like to view the Hecla Ponds on Wednesday, April 18, 2018 at 1:30 pm.

Please let me know if that is possible.

Thanks,

Tami Borchardt-Slayton
PITU Chairperson



THE PAIUTE INDIAN TRIBE OF UTAH

440 North Paiute Drive • Cedar City, Utah 84721 • (435) 586-1112

May 1, 2018

Shivwits Band Council
6060 West 3650 North
Ivins, UT 84738

Dear Shivwits Band Council,

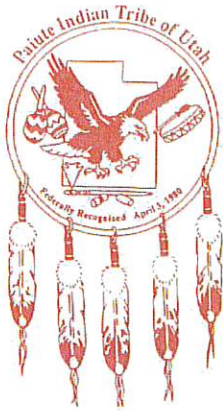
The Paiute Indian Tribe of Utah would like to formally meet with the Shivwits Band Council and the Bureau of Indian Affairs to discuss the exact reason why the Paiute Indian Tribe of Utah is not inclined to enter into the 638 contract without any confusion from either party.

Please see the letter enclosed letter addressed to the Bureau of Indian Affairs. If you have any further questions please contact me as soon as possible at (435) 586-1112 ext. 102 or tslayton@utahpaiutes.org

Sincerely,

Tamra Borchardt-Slayton
The Paiute Indian Tribe of Utah
Chairwoman

CC: The Paiute Indian Tribe of Utah Council



THE PAIUTE INDIAN TRIBE OF UTAH

440 North Paiute Drive • Cedar City, Utah 84721 • (435) 586-1112

May 1, 2018

James E. Williams, Superintendent
Southern Paiute and Truxton Canon Agencies
13067 East Highway 66
Valentine, AZ 86437

Dear Jim,

The Paiute Indian Tribe of Utah is formally requesting that the Bureau of Indian Affairs continue to collaborate with the Shivwits Band of Paiutes in regards to the Hecla Pond. The Paiute Indian Tribe of Utah will continue to support the Shivwits Band with their endeavors to find a solution for the Hecla Pond; although at this time it is not conducive for the tribe, the band, or BIA to enter into a 638 Contract on behalf of the Shivwits Band.

The Paiute Indian Tribe of Utah would like to formally meet with the Bureau of Indian Affairs and the Shivwits Band Council to discuss the exact reason why the Paiute Indian Tribe of Utah is not inclined to enter into the 638 contract without any confusion from either party.

If you have any further questions please contact me as soon as possible at (435) 586-1112 ext. 102 or tslayton@utahpaiutes.org

Sincerely,

Tamra Borchardt-Slayton
The Paiute Indian Tribe of Utah
Chairwoman

CC: The Paiute Indian Tribe of Utah Council
The Shivwits Band of Paiute Council

Regional Tribal Operations Committee
Meeting Minutes St. George, Utah
October 10-11, 2018

October 10, 2018 (Morning session)

Tami Slayton-Chairwomen gave a brief overview of their tribe and how it is made up of 5 bands, and that one of their biggest environmental concerns is mine tailings and settling ponds. They have worked with EPA and the Super funds to help get the answers they need. BIA did a study and told them what was wrong but nothing has been done yet to fix the problem. Every year this problem is still here even with promises they are not kept. The ground is contaminated and we are a small tribe and there isn't anything we can do to fix this. The mining company that caused all of this is the Hecla Mining Company, Kermit Snow said their tribe is also fighting them, and that reclamation bonds are important and that their tribe will fight them forever.

Glenn Rogers-The only way EPA will help is thru the Super Fund. EPA said it was OK to dig a hole and cap it but it is on a fault line. Hecla was bringing arsenic to these leach ponds. Kermit Snow talked about (3) ponds they have on their reservation, these ponds overflow during heavy rains.

Kim Varilek talked about the development of a Tribal resource center which will better interact with tribes and that it should be online in about 6 months.

NTC-National Tribal Caucus, these folks meet with EPA Headquarters on the National level, we are the lead Region and 2 of the 3 executive officers are from our region. An how we need to get the federal agencies to the March meeting so they can tell us how they can help.

ETEP's again was discussed, its a requirement for gap funding, tribes need to come up with their priorities. Shortly there will be an email going out to the North Dakota tribes asking when a good time will be to get together with EPA to work on the ETEP's.

Doug Benevento-Talked about National Program Guidance, what is EPA doing right and what ways can we improve.

Aspects of my job: I'm the voice for our Regional Tribes and I have the ability to make changes. What do you folks want of me, he would like dialogue from us (Tribes) I want some feed back. And direct implementation needs to be our focus. Mr. Benevento stated that drinking water is an issue for me. Things like safe drinking water act are a big issue for me. Its a public drinking water issue, we all want safe water along with recreational use, and fishing. Solid waste is another issue and we need to know how we can help, super fund hasn't acted in the urgency it should and we need to do a better job. Next week I will be meeting with senior leadership to talk about program guidance,"My opinion can be helped by your input". He also stated he always starts out with "Yes" and then I build off of it with the facts.

Jason/Scott NTC- Superfund -Jason wanted to know who takes it off the super fund like here in Utah Doug Benevento said EPA comes back every five years to review the site. EPA determines the risk, but to take it off their is a public comment period, and institutional controls have been established.

Scott talked about "ETEP's" GAP money used to formulate a plan, compliance assistance-(if tribes are out of compliance), capacity development, and how GAP money could be used for solid waste, hazardous waste, along with hazardous waste collection drives, and recycling programs. Scott talked about how the tribes had to develop "T's" and how the ETEP's got started. The inspector general conducted an audit and EPA needed to tell a better story on how the money was being used. Scott mentioned how there was some talk about scrapping GAP Guidance.

Doug Benevento did say that he did not agree with the spend it or lose it statement and that the money should be able to be rolled over.

Scott talked about the IHS-SDS process- Scott talked about a lagoon cell that they couldn't get funding for O&M because it didn't score enough points. EPA had a staffing problem with the drinking water systems so EPA decided to give their allocation of money to IHS and allow them to spend the money based on their SDS scoring system. Scott would like to get this fixed, Doug stated that he would follow up on this.

Lunch and tour (mine tailing site) afternoon

Jason Walker spoke on the productivity of yesterday's meeting. Talked about how the tribe would be getting some useful information from EPA Kim V. would be getting them the info she can find.

Jason also talked about getting his EPA funding award letter on October 2, 2018.

Doug Benevento mentioned yesterday about starting some type of tribal award, like, a certificate or some type of excellence award that could be given out at the March meeting.

Scott talked about having a grant for the last (3) years and how he still had about 70 thousand and of that he has between 40 and 50 thousand for technical assistance. So Scott would like everyone to know that he still has some money.

Willie K. shared her thoughts for the tribe testing their waters, and she has a QAPP and willing to share it.

Scott-how do we tell a better story, success stories how do we get it to AIEO, GAP online appeared to be something that could be used to tell the story.

NTC Tribal Delegates are Mark, Gerald, Scott and Jayson fills in for Mark when he isn't able to go. They will be having a 1 hour meeting with Mr. Wheeler to talk about the needs in Indian Country. Some of the issues are Water storage, and certified operators.

Richard talked about getting funded from IHS for the cleanup of 12 illegal dump sites on the Yankton Sioux Reservation, and this is the first time IHS has contributed funds to do this type of cleanup. Richard talked about the issues with recycling and composting, at this time recycling is tough due to the tariffs put on China and we are now getting \$50.00 per ton for cardboard when we had been getting as much as \$150.00 per ton.

Scott has started recycling, we bought equipment, roll offs, trailers, container bins for recycling, wood chipper. He is also considering a bulb recycler to capture the mercury. The requirement was they had buy equipment for the grant from Rural Development, they did also require a ISWMP. Scott said that

they transfer garbage to a landfill, Scott also talked about how they are getting residual from the dialysis patients this being plastic tubing and unused saline solution.

Kermit talked about being on a working group that is developing a ISWMP.

Roger Hancock was on the phone: He talked about ITEP and their Peer matching program and they will pay for travel either to go to them or they will come to you. Roger stated that Solid waste is the least funded program and HDQ's is trying to get a pool of money to help with that.

We then had a video presentation that had a lot of problems-

Scott talked about the VW settlement- 2 trust funds (1-for state and 1- for tribes) Currently there is 50 million with Wellington Trust. In January is when tribes could first apply for the money, 1st you have to be a trustee, so many tribes applies that they had to go back and relook at the funding formula. If a tribe wants to get a more efficient bus (diesel engine) there are a few options they can do like EPA has up to 2 million dollars to help pay 50%. This was originally a 5 year plan, but that is variable, Scott wanted to say if you want to get started let him know and he will help you get started. ITEP has the contract to help tribes to see if they are eligible. Once the judge for this has made a decision they have 60 days to start getting the money out. Scott asked if we wanted ITEP to come to Denver in March to give us some training. Scott stated he will check into this to see if they would be willing to.

NTC report out: Water of the U.S. process is on going, their is a work group that wants to weigh in on it. AIEO – GAP guidance work group has got a lot of comments and some of them directly from RTOC's in the spring they are going to send out a draft version and there will be another comment period, some of the thought is to scrap it. For several years NTC has developed a budget to present to President that shows the needs of the Tribe's Environmental Programs. NTC needs what you asked for and what you actually got, so they can show the unmet needs. Scott also let us know that Billy Maines will be retiring and thought we should put a letter of appreciation together for him, Scott said he will put the letter together.

January RTOC conference will be the week of January 14th, 2019. Dakota Sioux Casino,

Some items for thought: EPA look into Hecla, Meth house issues, Resource Center,

Motion to adjourn